No. 145

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

A. W. SEWELL AND JOHN SEWELL ——— *Petitioners*

v.

J. E. CROSSBIE, INC. (a Corporation) and
HENRY H. CROSS COMPANY (a Corporation) *Respondents*

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
EIGHTH CIRCUIT
AND
BRIEF IN SUPPORT THEREOF

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INDEX

Page

The Petition for Certiorari:

Statement of Matter Involved 1-5

Jurisdiction of this Court 5

Reasons Relied upon for Allowance of the Writ 5-10

Appendix I (Act 222 Arkansas, 1929) 11-13

Supporting Brief on Petition for Certiorari:

Statement of Facts 15-17

Assignment of Errors 19

Argument 20-33

TABLE OF AUTHORITIES

Cases Cited

Alabama Great Southern R.R. Co. v. Thompson, 200 U.S. 206 ..... 6, 29

Chicago & A.R. Co. v. New York, L.E. & W.R. Co., 24 F. 516-517 ..... 25, 26

Clinton v. Estes, 20 Ark. 224 30

Culp v. Baldwin, 87 F. (2d) 679 (C.C.A. 8) 6, 29

Drake v. Thyng, 37 Ark. 228 24

Erie R.R. Co. v. Tompkins, 304 U.S. 64-92 ..... 6, 29

Fordyce v. Dix, 58 Ark 136, 23 S.W. 767 22

Hamilton v. Empire Gas and Fuel Co., 297 F. 422 26

Leonard v. St. Joseph Lead Co., et al, 75 F. (2d) 390 ..... 6, 29

Louis v. Ingram, 57 F. (2d) 463 (10 C.C.A.) 6, 24

INDEX—Cont.

Page

McCandless v. Furlaud, et al., 296 U.S. 140 ..... 22, 24

New Amsterdam Casualty Co, et al. v. State, 196 Ark. 1092, 121 S.W. (2d) 75 ..... 7, 29

Pettibone v. U.S., 148 U.S. 197 30

Pirie v. Tvedt, 115 U.S. 41 22

Shreveport Pipe Line Co. v. Bennett, 172 Ark. 804, 290 S.W. 929 8, 31

Tabor v. Universal Exploration Co., 48 F. (2d) 1047 22

Torrence v. Shedd, 144 U.S. 527 22

United Mine Workers of America, et al. v. Coronado Coal Co., 258 F. 829, 830 ..... 6, 24

Watson v. Chevrolet Motor Co., 68 F. (2d) 686 ..... 6, 29

Wilson v. Davis, 138 Ark. 111, 211 S.W. 152 ..... 5, 9, 24

Statutes

28 U.S.C.A., Section 347 (A) 5

Act 222 of Arkansas, 1929 ..... 11, 13

28 U.S.C.A., Section 71 16

Text Books

1 Corpus Juris, Pages 1056-1057 ..... 21, 22

Glassmire, Second Edition, 1938, Oil and Gas Leases and Royalties 31

26 R.C.L., 1237 32

16 R.C.L., 903 32

Simpkins Federal Practice, Section 1084 (1938) 29

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

ABBREVIATED STATEMENT OF MATTER INVOLVED

The sole question presented in this petition is one of jurisdiction, it being our contention that our motion to remand to the state court should have been sustained.

Petitioners are the owners of oil producing lands situated in Ouachita County, Arkansas. During all of that period of time involved in this suit said lands were leased to J. E. Crosbie, Inc., a corporation domiciled in Oklahoma, Petitioners retaining a one-eighth royalty interest in such oil as was produced and recovered from said lands. J. E.

Crosbie, Inc., as lessee, had and exercised at all times exclusive control in the production and marketing of the crude oil recovered from said lands (Par. 11, R. 8). All of the oil was sold and delivered by the said J. E. Crosbie, Inc., to Henry H. Cross Company, Inc., owners and operators of a crude oil refinery located in Union County, Arkansas, approximately three miles from Petitioners' lands. The Henry H. Cross Company, Inc., is domiciled in Illinois which is also the state of residence of Petitioners. Certain violations of the provisions of Act 222 of the Acts of the General Assembly of the State of Arkansas of 1929 (Appendix 1) are charged: (Par. 19, R. 11-12) among others the provision of (Sec. 5) which required the Henry H. Cross Company, as purchasers of the oil to furnish Petitioners as owners of the royalty interest, a statement each month showing the correct amount of oil purchased during the previous month, together with the correct amount paid each interest therefor. During all of the time involved in this suit, monthly statements with remittances attached, were mailed to Petitioners by the Henry H. Cross Company showing that Petitioners were receiving the same price per barrel for their oil as that being paid to J. E. Crosbie, Inc. Such statements were false, however, for the reason that by a secret agreement between Crosbie and Henry H. Cross Company to defraud Petitioners, Crosbie was being paid several cents per barrel more for its part of the oil than was being received by Petitioners, and Cross was holding back substantial sums of money belonging to Petitioners (Par. 18, R. 10-11). Act 222, *supra*, was passed for the specific purpose of preventing this type of fraud upon royalty owners. The Act is short and should be examined in its entirety.

Promptly upon discovery of the true facts, this action for conspiracy to defraud to the damage of Petitioners was

filed in the Chancery Court of Ouachita County, Arkansas, against both defendants seeking a joint accounting and a joint recovery of the defendants. An examination of the complaint will reveal that the action stated is bottomed upon Act 222 and said complaint states, in language free of any ambiguity, that both defendants conspired to violate the provision of Act 222 and to cheat and swindle Petitioners of sums lawfully due them to their damage.

Defendant J. E. Crosbie, Inc., filed a petition to remove the action to the federal court, contending that the complaint presented a separable controversy as to it (R. 12-17). The case was removed. Petitioners promptly filed a motion to remand (R. 19-20) which was refused (R. 21). A trial was then had in the Federal District Court on the merits and judgment rendered for respondents (R. 74). Petitioners in their appeal to the Eighth Circuit Court of Appeals insisted that the complaint did not present a separable controversy as to J. E. Crosbie, Inc., and that the lower district court was without power to entertain jurisdiction of the cause except for the purpose of ordering a remand of the action to the state court. The Circuit Court of Appeals, in a sharply divided opinion handed down on April 23, 1942, found that the complaint as filed in the state court presented a separable controversy as to the non-resident J. E. Crosbie, Inc. (R. 78-84). The language employed in deciding this issue follows:

> "The complaint, among other things, clearly charges the defendant J. E. Crosbie, Inc., with a breach of contract in failing to account to plaintiffs for the correct proceeds of oil sold on their behalf. This cause of action was necessarily one in which only the plaintiffs and the defendant J. E. Crosbie, Inc., were involved. The other defendant was a purchaser of

oil and was not a party to the contract between the plaintiffs and J. E. Crosbie, Inc." (R. 82).

It is true that the original complaint did not allege that Henry H. Cross Company, the purchaser of the oil, was a party to the lease agreement, but it did allege that as purchaser of the oil it joined in a scheme and conspiracy to defraud Petitioners which scheme in order to be successful required a breaching of the provisions of the lease agreement by the lessee. The purchaser is always a party to a sale. There must be a purchaser before one can complete a sale. If you eliminate the purchaser and there is no sale of the oil, then, of course, no breach could be charged against the lessee in the sale of the oil, there being no sale. The complaint charged the purchaser Henry H. Cross Company as an indispensable party to the conspiracy to defraud which was, of course, the inducement which lead to the breach of the lease obligations on the part of Crosbie (Par. 18, R. 10-11).

Petitioners prayed in the suit in the state court for a full accounting and for a decree in judgment against the defendants jointly and severally (Par. 20, R. 12).

The sole question presented on this petition is whether the original cause did in fact present a separable controversy as to J. E. Crosbie, Inc. If not, it is clear that the state court should not have been divested of its jurisdiction, and that the lower district court erred in refusing Petitioners' motion to remand, and that the Circuit Court of Appeals committed error in affirming the action of the lower district court.

It will be necessary for this court to examine the entire complaint as a whole before determining whether a separable controversy may be carved out of the allegations

between Petitioners and the defendant J. E. Crosbie, Inc. Furthermore, this examination must be made in the light of the law of Arkansas which controls.

The answer of the defendant Henry H. Cross admits secret additional payments to J. E. Crosbie, Inc. (Par. 12, R. 43-44).

This is a petition for writ of certiorari to review the decree of the Circuit Court of Appeals of the Eighth Circuit.

JURISDICTION OF THIS COURT

Plainly this Court has jurisdiction to review the assigned error of the District Court and the Circuit Court of Appeals in wrongfully retaining jurisdiction of this cause in the federal court.

28 U.S.C.A. Section 347 (a)

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The Arkansas Supreme Court has squarely held that parties who conspire to defraud are liable as joint tort-feasors.

Wilson v. *Davis*, 138 Ark. 111,
211 S.W. 152.

The Circuit Court of Appeals for the Eighth Circuit has many times held that the question of whether a

separable controversy is presented in a complaint is to be determined by local law.

Cuip v. *Baldwin,* 87 F. (2d) 679, (C.C.A. 8);

Leonard v. *St. Joseph Lead Co., et al.,* 75 F. (2d) 390;

Watson v. *Chevrolet Mot. Co.,* 68 F. (2d) 686;

Cert. Den. 54 S. Ct. 716, 292 U.S. 637.

This Court has likewise established the rule that local law controls as to the existence of a separable controversy.

Alabama Great So. R.R. Co. v. *Thompson,* 200 U.S. 206;

Erie Railroad Co. v. *Tompkins,* 304 U.S. 64-92, 82 L. Ed. 1188.

The Circuit Court of Appeals Eighth Circuit has also held that all members of a conspiracy before it has been abandoned are responsible.

United Mine Workers of America, et al. v. *Coronado Coal Co.,* 258 F. 829, 830.

Each conspirator is jointly and severally liable for all damages resulting from the conspiracy.

Louis v. *Ingram,* 57 F. (2d) 463. (10 C.C.A.).

J. E. Crosbie, Inc., and Henry H. Cross Co., in their briefs and oral argument in the Circuit Court of Appeals did not cite a single Arkansas case to the court on any issue. The majority opinion handed down by the Circuit Court of Appeals likewise does not cite a single Arkansas

case to support its conclusions. The majority opinion of the Circuit Court of Appeals completely ignores the Arkansas law.

The decision of the Circuit Court of Appeals in thus refusing to follow the law of Arkansas on the question of a separable controversy in the complaint, is repugnant to and offends the rule of law established by this Honorable Court, requiring obedience to state law on such a question. Such a situation clearly calls for a review by this Honorable Court.

The Supreme Court of Arkansas has squarely held that the facts and circumstances alleged in this complaint constitute an action for conspiracy against all persons actively parties to the scheme. The case of *New Amsterdam Casualty Co., et al.* v. *State,* 196 Ark. 1092, 121 S.W. (2d) 75, is strikingly similar to the instant complaint in the very details of the method in which the conspirators perpetrated the fraud. In the *New Amsterdam Casualty Co., et al.* v. *State, supra,* we have the conspirators selling a product at one price, reporting another, and subsequently furnishing false figures and statement and remittances by secret agreement to cover up the fraud.

The Circuit Court of Appeals was not authorized, as pointed out in the dissenting opinion of Mr. Justice Woodrough to ignore the Arkansas law which plainly established the fact that the action stated in this complaint is primarily and essentially a joint action against the defendants for a conspiracy and such an action that no separable controversy may be carved therefrom. Under the Arkansas case, *New Amsterdam Casualty Co., et al.,* v. *State, supra,* the complaint stated a good joint cause of action against the defendants for conspiracy to defraud even though Act 222 had not been passed.

The majority opinion of the Circuit Court of Appeals is based upon the erroneous assumption that the co-conspirator Henry H. Cross Company as purchaser of the oil had nothing to do with the breach of the lease agreement by J. E. Crosbie, Inc., in failing to account to plaintiffs for the correct proceeds of oil sold. The complaint alleges, among other things, that Henry H. Cross Company prepared all the statements and sent all remittances to these Petitioners. Any sale requires two parties—seller and purchaser. It was impossible for J. E. Crosbie, Inc., to sell this oil under a secret agreement whereby it was to receive additional bonuses for its part of the oil without first finding a purchaser who was ready and willing to violate the plain provisions of Act 222 by sending false statements and insufficient remittances to Petitioners which was of course a necessary deception to make the fraudulent scheme succeed. In this instance, Henry H. Cross Company was that purchaser. Furthermore, there is no such thing as an innocent purchaser or crude petroleum directly from a lease in Arkansas. Every such purchaser of crude oil in Arkansas is charged with notice of the lessor's interest and the rights of the lessor.

Shreveport Pipe Line Co. v. *Bennett,*
172 Ark. 804, 290 S.W. 929.

Mr. Justice Woodrough succinctly analyzes the cause of action stated in the original complaint in his dissenting opinion in the following words:

> "But the picture here is that as the plaintiffs' oil runs out of the wells it flows into the hands of two parties. Neither is a servant of the other or of the plaintiffs, but both know the plaintiffs' rights. The physical possession of the oil affords opportunity to dispose of it and an obligation to account for the correct proceeds or true value of it is an obligation that

the law imposes on anyone who has the property of another in his possession and sells it. For breach of that obligation the law affords a choice of remedies. In Arkansas where two or more conspire to cheat the owner out of the value or proceeds, they commit a joint tort and are subject to a joint action.

Wilson v. *Davis,* 138 Ark. 111, 211 S.W. 152.

The plaintiffs here have chosen to bring a joint action against these defendants in a state court and it seems to me that their pleading of the background of contract, fiduciary relations, and duty to account which explains the opportunity for conspiracy is not inconsistent with the charge of joint tort as the actionable wrong. The basis for a federal jurisdiction founded in the contract seems to me elusory in view of the identical but joint liability to account that may be attributed to the conspiracy. I venture to dissent for that reason. * * * " (R. 85-86).

The dissenting opinion continues:

"One thing that stands out uncontrovertible is that on the face of the complaint, the plaintiffs had a right to maintain a joint action against the two parties who they say stood at the mouth of the oil well and cooperated to defraud them out of the proceeds of the oil, and that the plaintiffs in good faith attempted to state that joint action in their complaint and to recover on it. I think the federal court may well go back to that clear ground after considering all the arguments, and taking its stand upon it, decline the jurisdiction" (R. 86).

There is no way to escape the fact that the majority opinion of the Circuit Court of Appeals is contrary to the decisions of the Supreme Court of Arkansas and contrary to the decisions heretofore rendered by this Honorable Court.

Wherefore, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals to the Eighth District commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the United States Circuit of Appeals of the Eighth District be reversed, and that the decree of the District Court of the Western District of Arkansas be reversed by this Honorable Court, and for such other relief as to this Honorable Court may seem proper and just.

Osro Cobb and
Wallace Townsend

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